U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

MATTER OF PGNA-, PLLC

DATE: JUNE 7, 2016

APPEAL OF TEXAS SERVICE CENTER DECISION

PETITION: FORM I-140, IMMIGRANT PETITION FOR ALIEN WORKER

The Petitioner, an architectural firm, seeks to permanently employ the Beneficiary in the United States as architectural project staff. It requests classification of the Beneficiary as a member of the professions holding an advanced degree under the second preference immigrant classification. *See* Immigration and Nationality Act (the Act) section 203(b)(2), 8 U.S.C. § 1153(b)(2). This employment-based immigrant classification allows a U.S. employer to sponsor a professional with an advanced degree for lawful permanent resident status.

The Director, Texas Service Center, denied the petition on December 30, 2015. The Director determined that the Petitioner had not established that the Beneficiary possessed the required employment experience for the offered job as of the priority date.

The matter is now before us on appeal. The Petitioner asserts that the Director should have considered experience the Beneficiary gained with it in a different position. Upon *de novo* review, we will dismiss the appeal.

I. PROCEDURAL HISTORY

As required by statute, the petition is accompanied by an ETA Form 9089, Application for Permanent Employment Certification (labor certification), approved by the U.S. Department of Labor (DOL).[1] The priority date of the petition is January 2, 2015.[2]

Part H of the labor certification states that the offered position has the following minimum requirements:

H.4. Education: Master's degree in architecture.

. . .

H.6. Experience in the job offered: 36 months.

. . .

[1] *See* section 212(a)(5)(D) of the Act, 8 U.S.C. § 1182(a)(5)(D); *see also* 8 C.F.R. § 204.5(a)(2).

[2] The priority date is the date the DOL accepted the labor certification for processing. *See* 8 C.F.R. § 204.5(d).

H.10. Experience in an alternate occupation: None accepted.
H.14. Specific skills or other requirements: 3 years architectural design experience; Very strong understanding of policies and regulations of [redacted] Zoning Commission, Board of Zoning Adjustment, and Historic Preservation Review Board entitlement processes; Strong understanding of [redacted] zoning and building codes; Residential architectural design, production and build experience; Demonstrated team leadership skills; General knowledge of interior design practice, including programming, space planning, concept and design development, and detailing; Proficient in AutoCAD, Photoshop, Maya, SketchUp, and Ecotect.

The record of proceedings reflects that the Beneficiary possesses a master's degree in architecture from the [redacted] completed in 2008.

Part K of the labor certification states that the Beneficiary possesses the following employment experience:

- Self-employed freelance interior designer (part-time) from October 1, 2001, through May 30, 2005;
- Teaching assistant (part-time) at the [redacted] from August 1, 2005, through December 31, 2007;
- Staff architect for the Petitioner from September 15, 2008, until October 1, 2011; and,
- Architectural project staff for the Petitioner since October 2, 2011.

The record contains an experience letter from the Petitioner stating that it employed the Beneficiary as a staff architect from 2008 until 2011, and as architectural project staff since October 2011.

II. LAW AND ANALYSIS

A. The Roles of the DOL and USCIS in the Immigrant Visa Process

The employment-based immigrant visa process consists of three parts. First, the U.S. employer must obtain a labor certification, which DOL processes. *See* 20 C.F.R. § 656, *et seq.* The employer initiates its request for a labor certification by filing an ETA Form 9089, Application for Permanent Employment Certification (labor certification), with DOL. The labor certification sets forth: the position's job duties; the position's education, experience, and other special requirements; the required wage; and the position's work location(s). In addition, as part of the labor certification, a beneficiary attests to his or her education and experience. The date the labor certification is filed becomes the "priority date" for the immigrant visa petition. 8 C.F.R. § 204.5(d). The DOL's role in certifying the labor certification is set forth at section 212(a)(5)(A)(i) of the Act, 8 U.S.C. § 1182(a)(5)(A)(i). Its approval of the labor certification affirms that, "there are not sufficient [U.S.] workers who are able, willing qualified" to perform the offered position where the beneficiary will be employed, and that the employment of the beneficiary will not "adversely affect the wages and working conditions of workers in the United States similarly employed." *Id.* The labor certification is valid for 180 days from the date of its approval by DOL.

In the second step of the process, a petitioner files a Form I-140, Immigrant Petition for Alien Worker, with USCIS within the 180-day validity period. *See* 20 C.F.R. § 656.30(b)(1), 8 C.F.R. § 204.5. The agency then examines whether a petitioner can establish its ability to pay the proffered wage; whether the education and/or experience required for the offered position matches that required by the visa classification; and whether a beneficiary has the required education, training, and experience for the offered position. *See* section 203(b)(3)(A)(ii) of the Act, 8 U.S.C. § 1153(b)(3)(A)(ii); 8 C.F.R. §204.5.

B. The Minimum Requirements of the Offered Position

The petitioner must establish that the beneficiary satisfied all of the educational, training, experience and any other requirements of the offered position by the priority date. 8 C.F.R. § 103.2(b)(1), (12). *See Matter of Wing's Tea House*, 16 I&N Dec. 158, 159 (Acting Reg'l Comm'r 1977); *see also Matter of Katigbak*, 14 I&N Dec. 45, 49 (Reg'l Comm'r 1971).

In the instant case, the labor certification states that the offered position requires a master's degree in architecture and three years of experience in the offered job as architectural project staff. While the Petitioner indicated at Line H.14. of the labor certification that the position requires "3 years architectural design experience," this requirement cannot contradict the requirements stated in Lines H.4-H.10. Therefore, the requirement of experience in architectural design cannot override the Petitioner's statement in Line H.6-A. and H-10 that the position requires three years of experience in the offered job and no acceptable alternate occupation. Rather, the three years of architectural design experience is read to be a "Specific Skill" required in addition to the three years of experience in the offered job, even if gained concurrently.

As the Petitioner did not allow for experience in an alternate occupation, the Beneficiary's experience as a freelance interior designer and a teaching assistant are not qualifying experience.

The Director found that the Beneficiary's experience with the Petitioner as architectural project staff could not satisfy the requirements of the labor certification because the Petitioner affirmed at Line J.21. of the labor certification that the Beneficiary did not "gain any of the qualifying experience with the employer in a position substantially comparable to the job opportunity requested."

A petitioner generally cannot count qualifying experience that a beneficiary gained with the same employer that filed the labor certification, unless the experience was in a position "not substantially comparable" to the offered position, or the employer demonstrates that it is no longer feasible to train a worker to qualify for the position. 20 C.F.R. §§ 656.17(i)(3)(i), (ii). A "substantially comparable" position means one "requiring performance of the same job duties more than 50 percent of the time." 20 C.F.R. §656.17(i)(5)(ii).

Stated otherwise, if a beneficiary's qualifying experience with a petitioner is in the job offered, then 20 C.F.R. § 656.17(i)(3) bars the petitioner from counting the experience. On the other hand, if a

beneficiary's experience with the petitioner is in a position not substantially comparable to the offered position, then this experience can only be counted if the labor certification allows for experience in an alternate occupation at Line H.10.

The Petitioner asserts on appeal that it seeks to use the Beneficiary's experience with it as a staff architect, a position not substantially comparable to the offered position of architectural project staff. However, because the Petitioner will not accept experience in any alternate occupation, the Beneficiary's experience in this different position cannot be used to qualify for the offered job.

On appeal, the Petitioner states that the work performed by the Beneficiary and described on the labor certification are "very different" than the permanent position being offered. The Petitioner specifically indicated in response to question H.6 of the labor certification that 36 months of experience in the job offered is required and in response to question H.10 that experience in an alternate occupation is not acceptable. Therefore, by the Petitioner's own assertion, the Beneficiary did not possess the minimum requirements of the offered position set forth on the labor certification by the priority date. Accordingly, the petition must be denied.

III. CONCLUSION

In visa petition proceedings, it is the petitioner's burden to establish eligibility for the immigration benefit sought. Section 291 of the Act, 8 U.S.C. § 1361; *See Matter of Brantigan*, 11 I&N Dec. 493 (BIA 1966); *Matter of Otiende*, 26 I&N Dec. 127, 128 (BIA 2013). The Petitioner has not met that burden.

ORDER: The appeal is dismissed.

Cite as *Matter of PGNA-, PLLC*, ID# 17768 (AAO June 7, 2016)